

IMMIGRATION HABEAS PROCEEDINGS

I. OVERVIEW

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that the jurisdictional provisions in AEDPA and IIRIRA did not repeal the availability of habeas corpus jurisdiction under 28 U.S.C. § 2241 to challenge the legality of the agency's deportation and removal orders, *see also Calcano-Martinez v. INS*, 533 U.S. 348 (2001). Section 2241 confers jurisdiction upon the federal courts to hear claims that a person "is being held in custody in violation of the Constitution or laws [or treaties] of the United States." *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001) (concluding that alien may challenge post-removal-period detention in habeas proceedings) (internal quotations omitted). Habeas petitioners may also raise questions of law arising in the context of discretionary relief. *See St. Cyr*, 533 U.S. at 307-08 (reviewing impact of 1996 restrictions on the availability of discretionary relief).

II. REQUIREMENTS

A. Proper Respondent

This court has held that the proper respondent for an immigration detainee's habeas petition is the Secretary of the Department of Homeland Security, "and at least for the time being, the Attorney General." *Armentero v. INS*, No. 02-55368, 2003 WL 22004997 (9th Cir. Aug. 26, 2003) (holding that the INS is not the proper respondent, and remanding with instructions to allow petitioner to amend his petition to add the proper respondents). The court also noted that its analysis of the appropriate respondents "logically applies" to immigration habeas petitioners who are not in INS detention. *Id.* at *15 n.2.

B. Proper Court

"[T]he court of appeals does not have jurisdiction to entertain an original petition for a writ of habeas corpus." *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001). "[T]he district court alone has jurisdiction over an original habeas petition." *Id.* at 1075.

1. Transfer Statute

This court may treat a petition for review as a habeas petition, and transfer the case to the district court under the federal transfer statute, 28 U.S.C. § 1631. *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073-74 (9th Cir. 2001). “Transfer is appropriate under § 1631 if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice. *Id.* “Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating.” *Id.* (internal quotations omitted); *see also Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001) (transfer from district court to the court of appeals); *cf. Hose v. INS*, 180 F.3d 992 (9th Cir. 1999) (en banc) (holding that transfer would not be appropriate).

C. “In Custody” Requirement

The “in custody” requirement for habeas jurisdiction is broad enough to cover individuals subject to a final order of deportation or removal. *See e.g., Miranda v. Reno*, 238 F.3d 1156, 1158-59 (9th Cir. 2001) (noting that “jurisdiction has been extended beyond that which the most literal reading of the statute might require, to individuals who, though not subject to immediate physical imprisonment are subject to restraints not shared by the public generally that significantly confine and restrain [their] freedom.” (internal quotations and citations omitted)), *cert. denied*, 534 U.S. 1018 (2001); *see also Williams v. INS*, 795 F.2d 738 (9th Cir. 1986).

D. Departure from the United States

Generally, “[i]mmigrants who have already been removed, . . . do not satisfy the ‘in custody’ requirement of habeas corpus jurisdiction.” *Miranda*, 238 F.3d at 1159. However, where the habeas petition was filed before the alien’s removal, the courts continue to have jurisdiction, as long as the petitioner “continues to suffer actual collateral consequences of his removal.” *Zegarra-Gomez v. INS*, 314 F.3d 1124 (9th Cir. 2003). Moreover, where the removal was unlawful, this court has granted a habeas petition filed after removal. *See Singh v. Waters*, 87 F.3d 346 (9th Cir. 1996) (granting habeas

corpus petition filed after unlawful removal, and ordering INS to allow petitioner to return to the United States).

E. Fee Requirements

The filing fee provisions of the Prison Litigation Reform Act do not apply to INS detainees because an alien held by the INS is not a “prisoner” within the meaning of the PLRA. *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002).

III EXHAUSTION

A. Judicial Remedies

This court has required, “as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief” under section 2241. *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001); *see also Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003) (holding that petitioner should have raised his claim that he was not convicted of an aggravated felony before the court of appeals on direct petition for review).

B. Administrative Remedies

A “petitioner must exhaust administrative remedies before raising . . . constitutional claims in a habeas petition when those claims are reviewable by the BIA on appeal, such as ineffective assistance of counsel claims.” *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (holding that petitioner exhausted his claims by raising them in his notice of appeal to the BIA and in a motion for reconsideration); *see also Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995).

IV STANDARD OF REVIEW

We review de novo the district court’s decision on a petition for writ of habeas corpus. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002). We review factual findings for substantial evidence. *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997).

V SCOPE OF HABEAS REVIEW

A. Constitutional and Statutory Claims

Where the court of appeals lacks petition-for-review jurisdiction over a removal or deportation order, constitutional and statutory claims may be raised in habeas corpus proceedings in the district court. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003); *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *cf. Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reviewing criminal alien’s constitutional claim in a petition for review because claim involved a threshold issue of whether he was “convicted” under the INA).

B. Discretionary Claims

Section 2241 habeas relief is not available to challenge the manner in which the agency exercised its discretion in denying a request for a former section 212(c) waiver of deportation, absent a legal or constitutional claim. *Gutierrez-Chavez v. INS*, 298 F.3d 824 (9th Cir. 2002), *as amended by* 337 F.3d 1023 (9th Cir. 2003) (holding that “habeas is not available to claim that the INS simply came to an unwise, yet lawful, conclusion when it did exercise its discretion” when denying a section 212(c) waiver of deportation). However, “[h]abeas is available to claim that the INS somehow failed to exercise discretion in accordance with federal law or did so in an unconstitutional manner.” *Id.* (suggesting that “failure to exercise discretion or manifest injustice” would be cognizable claims in a 2241 habeas petition). This limitation on the scope of habeas review should not “be interpreted to in any way limit review of an alien’s allegations of a violation of the Constitution or federal statute in a § 2241 petition just because the case involves a discretionary determination.” *Id.*; *see also INS v. St. Cyr*, 533 U.S. 289 (2001) (reviewing question of law regarding the availability of discretionary relief).

This court’s dismissal of a petition for review for lack of jurisdiction does not preclude a habeas petition. *See Chang v. INS*, 307 F.3d 1185, 1188 n.1 (9th Cir. 2002) (“The fact that Chang initially appealed the BIA’s decision to this Court, and then sought habeas relief when we dismissed the appeal, does not present a jurisdictional issue because Chang’s claim is cognizable on

habeas as well as on direct appeal.”).

VI SECOND OR SUCCESSIVE PETITIONS

There is no prohibition to filing a second or successive section 2241 habeas petition. *Lema v. INS*, No. 02-35901, 2003 WL 22038390 n.9 (9th Cir. Sept. 2, 2003); *Barapind v. Reno*, 225 F.3d 1100, 1110-12 (9th Cir. 2000).

VII INDEFINITE DETENTION

Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that 8 U.S.C. § 1231(a)(6), the IIRIRA provision authorizing post-removal-order detentions, does not authorize indefinite detention of removable aliens); *Ma v. Reno*, 257 F.3d 1095 (9th Cir. 2001) (on remand in light of *Zadvydas*, affirming grant of habeas petition where removal to Cambodia was not likely to occur in the reasonably foreseeable future).

Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (holding that *Zadvydas* applies to inadmissible aliens).

Lema v. INS, No. 02-35901, 2003 WL 22038390 (9th Cir. Sept. 2, 2003) (holding that continued detention of removable aggravated felon was authorized under 8 U.S.C. § 1231(a)(1)(C) because petitioner refused to cooperate fully and honestly with officials to secure travel documents to Ethiopia); *see also Pelich v. INS*, 329 F.3d 1057 (9th Cir. 2003) (holding that continued detention of petitioner was authorized under 8 U.S.C. § 1231(a)(1)(C) because petitioner was impeding removal efforts).